



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/528,385	03/22/2005	Jerome Julien Guy Levy	3712036-00497	4309
29157 K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690	7590 02/25/2011		EXAMINER THAKUR, VIREN A	
			ART UNIT 1782	PAPER NUMBER
			NOTIFICATION DATE 02/25/2011	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/528,385	Applicant(s) LEVY ET AL.
Examiner VIREN THAKUR	Art Unit 1782

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 07 February 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(g).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____

Claim(s) objected to: _____

Claim(s) rejected: 1-9 and 11-16

Claim(s) withdrawn from consideration: _____

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____

/Rena L. Dye/
Supervisory Patent Examiner, Art Unit 1782

Continuation of 11. does NOT place the application in condition for allowance because: Applicants assert on page 3 of the response that the advantage of being able to package and dispense a thick but malleable frozen dessert from a pressurized receptacle due to the use of two different gases for dispensing the product, one which has the propulsion function and the other the expansion function. It is noted however, that the art teaches using the same propellant gas and expansion gas that applicants employ. The art also teaches employing such gases for dispensing of a thick, malleable frozen dessert from a pressurized container, see Riviere, for instance. Additionally, although Riviere teaches a pressurized container, the claim differs in employing a compartment having the dessert and a second compartment for the propellant gas. Once again, however, the art teaches that such compartmented containers have been conventionally employed for the purpose of dispensing aerated compositions, and Clauwert teaches that piston or bag-in can type containers facilitate the dispensing of aerated, viscous products due to the two separate compartments. Clauwert teaches that this facilitates more complete dispensing. Therefore, to modify Riviere who also teaches a pressurized container and to employ a compartmented piston or bag-in can container would have been obvious to one having ordinary skill in the art for the purpose of improving dispensability. Applicants also assert that the references relied on for teaching the pressurized containers are directed to different types of products and thus teach away from each other and therefore the skilled artisan would have no reason to combine the cited references to arrive at the present invention. This argument is not persuasive, since Packaging Technology, Clauwert, Giabatti, Scheindel and Schultz all teach that it has been conventional to employ pressurized and compartmented pressurized containers for dispensing of viscous, aerated confection products and where the aerated, viscous product can be frozen. Since these references teach that there would have been an advantage to employing separated containers such as piston or bag-in can (where the propellant would have been separated from the product), to modify Riviere, who already teaches employing a propellant gas and employing a rigid pressurized container, and to employ a piston type or bag-in can type container would thus have been obvious for the purpose of improving the completeness of the dispensing, as taught by the prior art.

Applicants assert on page 3, that Morley is directed to frozen products that emulate the features of soft serve ice cream at temperatures suitable for home freezers. It is noted however, that Morley has been relied on to teach the use of nitrous oxide for aeration of the frozen product and to also employ a partial freezing temperature for the purpose of achieving a soft serve type dessert. It is noted that Hall has only been relied on to teach employing freezing tunnels for freezing products. Destephano and Cox have been similarly relied on for this purpose. Since Riviere et al. already teaches freezing a product which can be stored in a pressurized container at -24 °C, for instance, to employ a tunnel freezer, when they have been taught by the art to be able to freeze to -24 °C, for instance would have been an obvious matter of choice and/or design.

Applicants also assert on page 4 that Smadar states that where a propellant gas is incorporated within the product, that additional refrigerant pressure for the purpose of dispensing the product is unnecessary. Thus, applicants assert that Smadar does not disclose the use of an insoluble propellant and a soluble expansion gas. It is noted however, that this would wholly have been a function of the particular amount of the expansion gas incorporated into the product and the particular resulting pressures generated therefrom, as well as the particular pressures desired. In any case, it is noted that the art teaches that there is an advantage to employing a separate propellant gas and a separate aerating gas and thus to modify Riviere and employ separate propellant and aerating gases would have been obvious for the purpose of improving dispensing of the product.

Applicants assert on page 5 that Cornelius is directed to a process of making a concentrated orange juice. It is noted however, that Cornelius has only been relied on to generically teach that nitrous oxide dissolves in the liquid during the blending of a comestible in a semi-frozen state because this facilitates dissolution of the gas into the product. Since the art already teaches employing nitrous oxide for making a thick, malleable frozen dessert, the teachings of Cornelius are analogous since they teach how to improve dissolution of the nitrous oxide gas. Regarding Clauwert, it is noted that Clauwert is analogous since Clauwert teaches employing pressurized cans for aiding in dispensing of very viscous edible materials.

Applicants also assert on page 5 of the response that Riviere and Smadar teach that gas is not necessary for expansion of the product. It is noted however, that Riviere clearly teaches that an aerating gas can be employed in the frozen product (see page 7, lines 20-24 of the translation). On page 16 of the translation, Riviere also teaches aerating gas such as nitrous oxide. Smadar has only been relied on as further teach that nitrous oxide can be incorporated into the dessert, as an expansion gas. Smadar also has been relied on to teach a pressurized container for developing a particular overrun to the frozen confection when dispensed. Getz and Morley have been further relied on to support that nitrous oxide can provide the aeration to the frozen confection to achieve a "soft-serve" type ice cream. Therefore, these references further support the use of nitrous oxide for providing aeration to a frozen confection.

Applicants also assert that the number of references relied on is evidence that the invention is not obvious and is based on hindsight reconstruction. It is noted, however, that Riviere already teaches the steps of injecting a gas into a dessert composition and packaging such a composition into an aerosol pressurized container, and using a propellant gas for dispensing. Riviere teaches freezing the composition within the container to within applicants claimed temperatures. Therefore, Riviere is missing the particular type of pressurized container and the placement of the propellant in one compartment which is maintained separated from a food containing compartment. Nevertheless, the secondary references further teach that such containers have been conventionally employed for dispensing a food comprising an aerating gas therein, such that upon dispensing the product becomes aerated. The art further teaches incorporation of aerating gases into a partial frozen composition, wherein the pressures and temperatures as claimed have also been taught, and the art teaches that incorporation of a gas during a partial frozen state can aid to achieve the desired degree of aeration during dispensing, due to the increased amount of the aerating gas that can be incorporated into the frozen dessert. Therefore, it is noted that on its' own, the use of a particular number of references is not persuasive and further does not overcome the prima facie case of obviousness. Additionally, it is not seen that elements of cited references have been picked and chosen to arrive at the present claims, since the references are related to the primary reference and in combination with the knowledge of one having ordinary skill in the art, further

teach advantages or provide motivation for employing a particular step for packaging a frozen dessert.